No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners

v.

STATE OF SOUTH DAKOTA

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF THE STATES OF ALABAMA AND NEVADA FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE, AND MEMORANDUM OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE

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MOTION OF THE STATES OF ALABAMA AND NEVADA FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE

Pursuant to Rule 29 of this Court's rules, the States of Alabama and Nevada hereby move the Court for leave to file out of time the attached amici curiae memorandum. As discussed below, the basis for this motion is that the attached memorandum is addressed solely to the issue raised by the Memorandum for the United States as Amicus Curiae, filed in this case on October 23, 1980.*

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* It is the understanding of the States of Alabama and Nevada that the Memorandum of the United States as Amicus Curiae was accepted for filing after the deadline set forth in Rule 36 of this Court's rules.

The States of Alabama and Nevada were unaware of the existence of the United States' Memorandum until October 27, 1980, whereupon they immediately prepared the attached amici curiae memorandum.

As is discussed in the attached memorandum, the issue implicitly raised by the United States' Memorandum is whether the important questions of federal statutory and constitutional law raised by the Petition in the instant case should be resolved by this Court by review of the instant case or whether, instead, the Court should grant a writ of certiorari in another case raising the same issues on the basis of a clearer and more comprehensive record. The Memorandum for the United States neglects to mention that the United States' own petition for a writ of certiorari is due to be filed in this Court no later than December 8, 1980, to review the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366 (1980). We submit that that case—which was based upon a stipulated record setting forth the relevant facts concerning the major churches in the two states and how those churches and their related schools would be affected by the statutory interpretation proposed by the Secretary of Labor—will present the Court a preferable vehicle upon which to decide the far-reaching questions raised in the instant case.

The States of Alabama and Nevada respectfully request this Court to allow them to file the attached amici curiae memorandum in order to clarify for the Court the questions raised by the Memorandum of the United States, and in order to assist the Court in selecting the appropriate vehicle for review of the important issues raised by the Secretary of Labor's interpretation of federal law.

Respectfully submitted,

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QUESTIONS PRESENTED

The States of Alabama and Nevada adopt the questions presented in the Memorandum for the United States as Amicus Curiae.

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MEMORANDUM OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE

INTEREST OF THE STATES OF ALABAMA AND NEVADA

On October 31, 1979, the United States Secretary of Labor decided to withhold certification from the States of Alabama and Nevada under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3310, on the basis that those states were not in compliance with FUTA for the 12-month period ending October 31, 1979, because they had failed to extend their unemployment compensation laws to employees performing services in church elementary and secondary schools. The States of Alabama and Nevada sought review of the Secretary of Labor's

ruling in the United States Court of Appeals for the Fifth Circuit, and, on September 8, 1980, that court set aside the Secretary of Labor's decision. *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366. A petition for a writ of certiorari in that case will be due in this Court on December 8, 1980. A final denial of certification under FUTA to the States of Alabama and Nevada would subject those States to the loss of millions of dollars of federal grants for administration of their unemployment compensation laws and public employment offices and would subject private employers in those States to the loss of hundreds of millions of dollars of credits against the Federal Unemployment Tax. *See* 26 U.S.C. § 3302; 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504.

The decision of the Supreme Court of South Dakota in this case raises precisely the same issues presented by the proceedings brought by the Secretary of Labor to deny certification to the States of Alabama and Nevada under FUTA. Because of the serious impact that a denial of certification under FUTA would have upon the States, upon participants in the States' unemployment programs, and upon private employers in the States, the States of Alabama and Nevada[1] have a substantial interest in resolution of the issues raised by the decision of the Supreme Court of South Dakota.

SUMMARY OF ARGUMENT

The States of Alabama and Nevada request this Court to defer consideration of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota until December 8, 1980, when a petition for a writ of certiorari in the case of *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), will be due.

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[1] This memorandum is filed by the States of Alabama and Nevada as Amici Curiae pursuant to Rule 36.4 of the rules of this Court.

The latter case presents a significantly better vehicle for review by this Court of the broad national issues presented by the decision of the Secretary of Labor that FUTA requires the extension of state unemployment compensation laws to church elementary and secondary schools. Alabama and Nevada thus urge the Court to await the filing by the United States of a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit before determining whether to grant or deny the Petition in this case.

ARGUMENT

The Secretary of Labor instituted administrative proceedings to withhold certification from the States of Alabama and Nevada in 1979 due to the States' failure to extend their unemployment compensation laws to church elementary and secondary schools. Alabama and Nevada have contended that the Secretary's interpretation of section 3309(b)(1) of FUTA to require such coverage is erroneous and that the extension of unemployment laws to church elementary and secondary schools would violate the Religion Clauses of the First Amendment.

A hearing was held in the 1979 certification proceedings before an Administrative Law Judge of the Department of Labor. The record consisted primarily of extensive stipulations of fact agreed to by the Department of Labor and the unemployment agencies of the States of Alabama and Nevada. The Administrative Law Judge recommended certification of the States of Alabama and Nevada, but the Secretary of Labor rejected the recommendation. Alabama and Nevada sought review of the Secretary's decision in the United States Court of Appeals for the Fifth Circuit, and, on September 8, 1980, the court of appeals held that the Secretary of Labor's interpretation of section 3309(b)(1) of FUTA was erroneous. *States of Alabama and Nevada* v. *Marshall*, *supra*, 626 F.2d at 369.

The case from the Supreme Court of South Dakota did not arise under the procedures set forth in FUTA for determining whether states should be certified as in compliance with FUTA's provisions. The South Dakota case originated in the state unemployment agency when two Lutheran church schools administratively appealed the state agency's decision to comply with the Secretary of Labor's directive that states must extend their unemployment compensation laws to church elementary and secondary schools. The United States Secretary of Labor was not a participant in the South Dakota case. Although the decision of the Supreme Court of South Dakota interprets FUTA, the issue in the case, as recognized by the United States in its memorandum as amicus curiae, p. 6, actually involved the construction of the South Dakota unemployment compensation law.

The case decided by the United States Court of Appeals for the Fifth Circuit provides a significantly more suitable basis for resolution by this Court of the serious statutory and constitutional questions presented by the Secretary of Labor's interpretation of FUTA to require states to extend their unemployment compensation laws to church elementary and secondary schools. The resolution of these issues will affect the obligations of all 50 states in the Nation and every major church group as well. Because the questions to be decided depend upon the proper interpretation of section 3309(b)(1) of FUTA, it is appropriate to rule upon those questions in a case in which the federal statute itself, as opposed to a similar state statute, is actually at issue. It is also appropriate to rule on these important questions in a case in which the Secretary of Labor has issued a formal decision explaining the basis for his interpretation of FUTA. Moreover, because the United States, through the Secretary of Labor, was a party to the administrative proceedings involving Alabama and Nevada, it would participate directly as a party in proceedings before this Court upon a petition for

a writ of certiorari from the Fifth Circuit, rather than as an amicus curiae in proceedings upon the Petition in the instant case.

In addition to the above considerations, the broad record developed in the administrative proceedings leading to the decision of the Fifth Circuit provides a better basis for a ruling by this Court on the statutory and constitutional questions presented by the Secretary of Labor's interpretation of FUTA. The extensive stipulations of fact entered into between the parties in that case describe the operations and organization of the elementary and secondary school systems of several major church groups.[2] The South Dakota case, on the contrary, involves only two schools of one denomination. The stipulated record in the case from the Fifth Circuit also demonstrates the effect that extension of state unemployment compensation laws to church elementary and secondary schools would have on the operation of such schools.

Finally, deferral of a ruling on the Petition for a Writ of Certiorari to the Supreme Court of South Dakota until December 8, 1980, when a petition for a writ of certiorari is due in the case from the Fifth Circuit, will not significantly delay the Court's consideration of the issues raised by the Secretary of Labor's interpretation of FUTA.[3]

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[2] The church groups covered by the stipulations are the Roman Catholic, Lutheran and Baptist denominations.

[3] The States of Alabama and Nevada will be prepared to file their response supporting the grant of a petition for a writ of certiorari in *States of Alabama and Nevada* v. *Marshall, supra,* immediately after the petition is filed. The Court would thus be in a position to consider and rule upon both petitions before early January, 1981. Under Rule 35 of this Court's rules, petitioners' brief would be due by mid-February, and the brief of respondent would be due by mid-March. The case could thus be calendared for argument before the end of this term.

CONCLUSION

The Court should defer a ruling on the Petition for a Writ of Certiorari in the instant case until December 8, 1980, when a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is due in *States of Alabama and Nevada* v. *Marshall, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of the States of Alabama and Nevada for Leave to File Memorandum as Amici Curiae, and Memorandum of the States of Alabama and Nevada as Amici Curiae were served by mail, postage prepaid, this 29th day of October, 1980, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for petitioners; Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for respondents; and by hand on F. James Foley, Attorney, Department of Justice, Washington, D.C. 20530, counsel for the United States as amicus curiae.

Allen R. Snyder